***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

562

Brief for Appellant

IN THE

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 22325

LOUIS E. LANDRY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal From The United States District Court For The District Of Columbia

MICHAEL E. TIGAR
1000 Hill Building
Washington, D. C. 20006
(Appointed by this Court)

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## ISSUES PRESENTED FOR REVIEW

1. Whether an indictment for mutilation and destruction of a selective service certificate which omits to allege to whom, when, and under what regulatory provisions the certificate was issued, that it was validly issued and valid at the time of its alleged mutilation or destruction, and the manner of its alleged mutilation and destruction, states an offense against the United States.

2. Whether the district judge may deny a joint government and defense motion to decertify a criminal case from the ready calendar when such motion is made in the defendant's interest and in furtherance of the policies of the Department of Justice in the prosecution of selective service cases.

3. Whether a conviction for mutilation of a Selective Service Notice of Classification may be obtained even though the local board's issuance of the notice was in excess of its jurisdiction; and whether the board's loss of jurisdiction also deprives the government of the power to punish the registrant for mutilation of his registration certificate.

4. Whether "mutilation" of selective service certificates may, in accordance with constitutional and statutory principles, be defined so as to permit punishment of a defendant for conduct which infringes no governmental interest and has not rendered his certificates permanently unavailable.

## STATEMENT OF THE CASE

### Jurisdiction

Judgments of conviction were entered against the defendant on July 26, 1968, in the United States District Court for the District of Columbia, on both counts of a two-count indictment under 50 U.S.C. App. 462(b). Notice of appeal was filed August 1, 1968, and leave to appeal in forma pauperis was granted August 21, 1968. This Court has jurisdiction under 28 U.S.C. § 1291.

### Facts

Louis E. Landry, who at the time of the alleged offense was 21 years of age, appeals from his conviction of destruction and mutilation of a Registration Certificate (SSS Form No. 2) and Notice of Classification (SSS Form No. 110) issued under the Universal Military Training and Service Act, 65 Stat. 77, since renamed and re-enacted as the Military Selective Service Act of 1967, 81 Stat. 100.

The evidence at trial showed that the defendant was born and raised in Miami, Florida, the son of a Canadian immigrant sailor. After completing his education in Miami's public schools, he received an academic and sports scholarship to Pomona College in Claremont, California, which he attended for two years. Tr. 307. In his second year, Landry became acquainted with one Bob

5. Whether the "wilfulness" requirement of the draft card destruction law, in accordance with a consistent course of Supreme Court decisions construing the term, should be defined as requiring proof of "evil motive" and "want of justification."

6. Whether a prosecution rebuttal summation which is far longer than the prosecutor's opening and the defense summation, which strays beyond the issues in the case to identify the defendant with "rule by mobs", and which expresses the prosecutor's conclusion on issues in the case, is prejudicially inflammatory.

7. Whether the trial judge was required to instruct the jury that the defendant's possession or nonpossession of his selective service certificates was irrelevant to the issues in the case, after the subject had been raised by the prosecutor in his closing argument and objected to by the defense.

8. Whether a trial judge's policy of not disclosing the contents of presentence reports is proper given the expanded discretion committed to trial judges under the 1966 amendment to F.R.Crim.P. 32(c)(2), and whether in any case, trial judges should be required in selective service cases involving claims of conscientious objection, or, alternatively, in all cases, either to disclose the contents of the report or give reasons related to the particular case for not doing so.

STATEMENT REQUIRED BY RULE 8(b)

This case has never been before this Court, under the above or any other title.

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Minnich, a member of the Church of the Brethren,[1] who had returned from a two year assignment on alternative civilian service under the Civilian Work Program of the Selective Service System. In his discussions with Minnich, Landry determined that he must perform some constructive work in society "instead of all the destructive work that was going on around me." However, since he was a B-plus student in excellent standing at Pomona, he was clearly entitled to remain in Class II-S (student deferred for study) for two more years. Tr. 308-09. So long as he remained a student, he was ineligible for conscientious objector status. See 32 C.F.R. § 1623.2 (1968).[2] Landry therefore obtained a two-year leave of absence from college, to begin in June 1966 and run through September 1968. At the same time, he applied for conscientious objector status at his local selective service board in Miami. He also made application to and was accepted in the Brethren Voluntary Service alternative service training program. Tr. 309-10.

The local board rejected Landry's claim of conscientious objection.[3]

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1/ The Brethren are a "peace church" of long standing. See "Statements of Religious Bodies on Conscientious Objectors," published by Nat'l Service Board for Religious objectors.

2/ All regulations are cited to the current C.F.R. compilation, except when the regulation in force at the time of a relevant event has since been amended. Student deferments prior to 1967 were governed by different regulations than now prevail. See 32 C.F.R. § 1622.25 (1967) (amended).

3/ See Point III, infra, for a full discussion of this issue.

Nonetheless, he continued in the alternative service program, training in a training unit at New Windsor, Maryland, operated by Brethren Voluntary Service,[4] and then working under BVS orders first in a men's alcoholic shelter in Hagerstown, Maryland, and then in a slum tenants' project in Chicago, Illinois, organized there by the West Side Christian Parish. While in Chicago, he came into contact with the Southern Christian Leadership Conference and came to believe that the problem of poverty would not be solved so long as the war in Vietnam continued (a sentiment held by SCLC leader, the late Dr. Martin Luther King, Jr.). Tr. 310-11.

On April 16, 1968, Landry went to New York and joined a Boston-to-Washington peace walk which was then in progress. For the next several weeks, the walk proceeded along the Eastern coast of the United States, and Landry had extensive discussions with the other participants concerning the role of violence in contemporary American society.[5] Tr. 311-12; 184-89. He reflected upon his own selective service status, then on appeal from the local board's determination rejecting his claim of conscientious objection. While on the walk, he determined to hand in his

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[4] BVS publishes a pamphlet for trainees, on the behavior and commitment expected of them, entitled "Point of View."

[5] He was a responsible and peaceable member of the group. Tr. 188-89.

Selective Service Registration Certificate and Notice of Classification to Selective Service Director Hershey when the walk reached Washington.[6/] Tr. 311-12.

On May 7, 1967, the marchers reached Washington, where they had planned a quiet and orderly picket line in front of the National Selective Service Headquarters, 1724 F Street, N.W. for May 8. Tr. 311-12; 190-91. That morning, Landry spoke by telephone with Peter Laine, a reporter for the Miami Herald, among other papers, and told Laine of his intention to give in his certificates to General Hershey. That afternoon, and conformably to this intention, Landry separated himself out from the group of marchers in front of the National Headquarters and walked up the wide walkway, perpendicular to the F Street sidewalk, to the glass doors of the Headquarters building. By the time he reached the door, a guard had locked it, although the testimony is unclear as to whether the guard locked the door as Landry approached or whether the door had been locked for some time. Tr. 102-19; 132-40; 168-82; 312-15.

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6/ At the time (May 1967) no System policy existed regarding such turn-ins. Since October 26, 1967, the System has taken the view (not shared by the Justice Department) that card turn-ins are a criminal offense and may be proceeded against as "delinquency." See Oestereich v. Selective Service System, 393 U.S. , 1 Sel. Serv. L. Rep. 3215 (1968); Griffiths, Punitive Reclassification of Registrants Who Turn In Their Draft Cards, 1 Sel. Serv. L. Rep. 4001 (1968). Nonpossession of one's certificates is not a crime, it may be argued. Dranitzke, Possession of Registration Certificates and Notices of Classificatio by Selective Service Registrants, 1 Sel. Serv. L. Rep. 4029 (1968).

At the door, according to a government witness, Landry said politely, "I'd just like to see General Hershey if he's in." Tr. 114. Landry was denied admittance. He stood for about ten seconds, perhaps more, at the door. Then, he stepped back a few paces toward the sidewalk. As Landry vividly described the ensuing scene:

> "I remember moving back some, going down the steps, a few feet. And I was sort of confused because my intention, as I perceived what would happen, I didn't think they would let me see General Hershey, I thought he would be busy or out; so I expected to go in, and there would be some receptionist or secretary, and I would give them the card, and I would discuss with her my viewpoints. And apparently this was not going to happen. And so I was confused. And I remembered seeing -- that I had witnessed in New York City at an April mobilization, it was at Sheep Meadow early in the morning where a large group of men, including two friends of mine, had burned their cards in a mass demonstration. And I remembered how -- what an alienating sight it was, because reporters, all people, were more concerned with the ashes and the flame than they were with the commitment of these men and what they were trying to infer. And I saw it as an alienating act, it separated people. And I knew that violence has many forms. An aggressive person dominating or trying to control a submissive person is violence, and a lot of economic forms are violent, trying to strangle people. And I didn't want to be a participant in that violence, and I was mad at myself that I hadn't brought an envelope that I could put my cards in and put them in the mail box, because I had thought of that if I wouldn't have been able to get in, and I was mad that I had forgotten. And I remember all the reporters were jeering, they were all crowded around me, holding mikes and cameras, 'What are you going to do now, Landry?' 'What are you going to do now?' And I felt a little foolish not being

> able to get in. I had the cards in my hand, and my hands were a little moist, and I started to wring them some, and I tore them. I tore them this way, and tore them the other way, and I put them in my pocket. (Indicating.)" Tr. 314-15.

The defendant's version corresponds in essential particulars with that of the other witnesses to the events in question, both prosecution and defense.[7/]

The next day at dusk, the defendant was with the Boston-to-Washington group out at the Pentagon, where he was approached by two Special Agents of the FBI, John Blazek and Carter Billings. Tr. 141-56. As Agent Blazek testified:

> "There is a small garden outside of the river entrance at the Pentagon and away from the parking lot. There are flowers there and there are benches there, and he was seated on one of the benches." Tr. 153.

Agents Blazek and Billings sat beside Landry and, after obtaining an oral waiver of his privilege against self-incrimination and right to counsel, elicited from him his name, date of birth, address, and local board number. Tr. 153. Landry stated that he had torn his selective service certificates. When asked for evidence that he had done this, Landry produced some pieces of paper from his pocket. Blazek told him that these were not sufficient. Landry then "reached into his pocket again and handed [Agent Blazek] several more portions of his Selective Service Registration Certificate and two portions of the classification cards." Tr. 145.

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7/ FBI Agent Burgess testified that he could not hear the statements of the reporters near Landry. Tr. 331-32.

There on the bench in the garden, Agent Blazek assembled the pieces of paper he had been given. Four of the pieces, when assembled, constituted the entire Selective Service Registration Certificate of the defendant. Tr. 154-55. Blazek then took the pieces into his custody, from whence they were introduced into evidence at trial.

Landry was indicted in two counts, for mutilation and destruction of a registration certificate (Count I) and for mutilation and destruction of a notice of classification (Count II), under the so-called "card-burning"law, 50 United States Code Appendix § 462(b)(3), added in 1965. On Landry's plea of not guilty, he was tried before Corcoran, J., and a jury, resulting in a verdict of guilty on both counts. He was sentenced to from one to three years on each count, the sentences to run concurrently. Further facts relating to specific points are contained at appropriate places in the course of the argument.

## ARGUMENT

### I. The Indictment Failed To State An Offense Against The United States, In That It Was Vague And Failed To Apprise The Defendant Of The Specific Offense With Which He Was Charged.

Recognizing that courts seldom overturn a conviction for some claimed inadequacy in the charging papers, appellant submits that this is a case in which reversal is required. The indictment is in two counts. Count One charges:

> On or about May 8, 1967, within the District of Columbia, Louis E. Landry unlawfully, wilfully and knowingly did destroy and mutilate a certificate, to wit, a Registration Certificate (SSS Form No. 2) issued pursuant to the Universal Military Training and Service Act, Title 50, Appendix, United States Code, Section 451 et seq., and the rules, regulations and directions made pursuant thereto.

Count Two is identical, except that the words "Notice of Classification (SSS Form No. 110)" appear in place of the words "Registration Certificate (SSS Form No. 2.)" The statute apparently involved[8/] is 50 U.S.C. App. § 462(b)(3), which proscribes forgery, alteration, destruction or mutilation of any "registration certificate . . . or any other certificate issued pursuant to the provisions of this title or rules or regulations promulgated hereunder." This language is important, for its generality, compounded by the indictment's choice of different though equally vague words to state the alleged offense, reflects on the question whether the indictment states an offense.

A. Introduction: The Standard to be Employed

The appellant has argued under Point IV, infra, that the application of § 462(b)(3) to him in the circumstances of this case violated the first amendment. This fact is important in evaluating the indictment. As Judge Youngdahl observed in United States v. Lattimore, 127 F. Supp. 405, 407 (D.D.C. 1955), aff'd, 232 F.2d 334, 98 U.S. App. D.C. 77 (1955):

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8/ The caption cites 50 U.S.C. App. § 462(b).

> "[W]hen the charge in an indictment is in the area of the First Amendment, evidencing possible conflict with its guarantees of free thought, belief and expression, and when such indictment is challenged as being vague and indefinite, the Court will uphold it only after subjecting its legal sufficiency to exacting scrutiny."9/

Turning to the principles generally applicable to the construction of indictments, the case of Fontana v. United States, 262 Fed. 283, 286 (8th Cir. 1919), is in point:

> "When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him."

See also Hunter v. District of Columbia, 47 App. D.C. 406 (1918), and for an indication that the rule of Hunter has vitality under the Federal Rules of Criminal Procedure, see Russell v. United States, 369 U.S. 749 (1962).

These requirements serve important purposes in the criminal law, Sel. Serv. L. Rep., Practice Manual, ¶ 2202.

In flat contradiction to the rules set out above, the indictment here so utterly fails to set forth the facts upon which the government wished to rely that it falls afoul of the requirements of Rule 7(b), Federal Rules of Criminal Procedure, that the indictment be a "plain, concise, and definite written

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9/ The pendency (or even the threat) of a criminal prosecution may exert a "chilling effect" on the exercise of first amendment freedoms. Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). Therefore, indictments in this shpere must be carefully scrutinized.

statement of the essential facts constituting the offense charged," of the Sixth Amendment apprisal requirement, and of the rule which requires specificity enough that the indictment may be pleaded in bar of a subsequent prosecution. Hunter v. District of Columbia, supra, 47 App. D.C. at 408; United States v. Strauss, 285 F.2d 953, 955 (5th Cir. 1960).

Particular objections to the indictment are considered below seriatim.

A. Failure to Identify the Certificates

The "card burning" law was passed in part to deal with so-called "mass public burnings of draft registration cards." Remarks of Senator Thurmond, Con. Rec., August 10, 1965, p. 19012. This Court may also take judicial notice that in many cities across the United States, numbers of persons have destroyed or mutilated draft registration cards or notices of classification. See Ramparts Magazine, December 1967, front cover. Conceivably, all the participants in such a demonstration could be prosecuted for the burning of a single draft card -- that of one demonstrator -- and joined in a single indictment. The person who actually burnt a card would be guilty as a principal, the others as aiders and abettors. Then, if the first prosecution failed, another indictment might be brought on the same theory but dealing with a different Registration Card. This possibility, not fanciful given the character of many draft-card destruction situations and the tenacity with which the

Justice Department and the Congress have determined to prosecute card destroyers, see 50 U.S.C. App.§462(a), reveals a crucial defect in the indictment in this case. For the indictment does not allege whose Registration Card and Notice of Classification was allegedly destroyed or mutilated. Nor does it give any other facts which might enable the defendant to identify the subject matter of the alleged offense. In addition, even though the defendant could use the trial record to supplement the indictment on a plea of antrefois convict in the event of a new prosecution for the same offense, it is clear that to permit such loose pleading is to create a danger of double jeopardy for others.

The indictment herein is similar to that in United States v. Devine's Milk Laboratories, 179 F. Supp. 799 (D. Mass. 1960), which was dismissed for failure to apprise the defendant of the offense with which he was charged. In Devine Milk, the indictment sought to charge a conspiracy to make false statements and false claims to the Army, but did not, said the court,"indicate what specific false statements or claims were to be made or presented, or even the general subject matter in connection with which any false statements or claims were to be made or presented." Id. at 801. So in this case, the indictment does not identify the specific object which was the subject matter of the alleged crime. This case is, indeed, a fortiori Devine Milk, for a conspiracy may be charged with less precision than

a substantive offense. Id. at 800. Devine Milk was cited with approval in Russell v. United States, 369 U.S. 749, 766 n. 13 (1962). See also United States v. United States Savings & Loan League, 9 F.R.D. 450 (D.D.C. 1949) (Curran, J.).

This case is not analytically different from one charging concealment of assets or property of a bankrupt, where the clear rule is that the indictment must specify the property concealed. E.g., United States v. Strauss, 285 F.2d 953 (5th Cir. 1960); White v. United States, 67 F.2d 71 (10th Cir. 1933). This is so even though the concealing statute speaks generally in proscribing concealment of "property" of a corporation. To state the principle in terms of general application,

> "'It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the language of the statute; but it must state the species -- it must descend to particulars" [citation omitted] An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute."'" Russell v. United States, 369 U.S. at 765.

Would this court sustain an indictment for murder which did not contain the name of the alleged victim? It is respectfully suggested that it would not. See Form 1, Appendix of Forms, F.R.Crim.P.; Carter v. United States, 173 F.2d 684 (10th Cir. 1949). It follows, therefore, that failure of the present indictment to describe the subject matter of the offense in terms more

precise must similarly be held inadequate. There are, after all, notices of classification and draft registration cards issued to the overwhelming majority of American men over 18. An indictment under which so many million possible cases might be proven must be dismissed. Compare United States v. United States Savings & Loan League, supra, (six possible cases); United States v. Westbrook, 114 F. Supp. 192 (W.D.Ark. 1953).

B. The Failure to Bring the Crime Within Legislative Intent -- Validity of Issuance

The indictment alleges only that the two documents allegedly destroyed or mutilated were "issued." By omitting to allege that they were validly issued, or that they were still valid at the time of their alleged destruction, the indictment omits an essential element of the offense intended by the Congress to be proscribed, and of the offense which certain sections of the copious body of statutes, rules and regulations cited in the body of the indictment appear to describe.

The Selective Service Regulations, set forth in Title 32 of the Code of Federal Regulations, are lengthy. Pertinent to the present case are those which deal with possession of Registration Certificates, 32 C.F.R. § 1617.1, and Notices of Classification, 32 C.F.R. § 1623.5. Both forms carry on them, moreover, a legend requiring the registrant to carry them. Compare Drantitzke, Possession of Registration Certificates

and Notices of Classification By Selective Service Registrants, 1 Sel. Serv. L. Rep. 4029 (1968).[10/]

The Regulations contemplate the issuance of several notices of classification to the same person, one each time he is reclassified. 32 C.F.R. §§ 1623.4, 1624.2, 1625.12, 1626.31, 1627.7. The regulations are absolutely silent as to what must be done with one's old Notice of Classification when a new one is received. Because the current notice is the only one which has any conceivable relevance to the Selective Service System's needs and goals, see United States v. Miller, 367 F.2d 72, 81 (2d Cir. 1966), it seems clear that destruction of a noncurrent Notice of Classification would not be a crime. Yet the indictment in this case would permit proof of destruction of a noncurrent Notice of Classification in support of its allegations. Similarly, it would permit proof that a cancelled Registration Certificate was destroyed. There is, in short, no allegation that the destroyed certificate and notice were valid, subsisting forms such as the legislature apparently intended to require persons to keep intact.

Thus, the indictment does not comport with the apprisal requirements of Rule 7(b) and the Sixth Amendment, for it does not set forth facts sufficient to bring the alleged conduct of

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10/ §§ 1617.1 and 1623.5 also make it mandatory that military officials destroy the registration certificate and notice of classification when the registrant is inducted. Yet the indictment does not allege that the defendant did not perform the alleged destruction without authority of law.

the defendant within the crime intended by the legislature to be punished:

> "'The fact that the statute in question, read in light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.'" Ornelas v. United States, 236 F.2d 392, 393 (9th Cir. 1956), quoting from United States v. Carll, 105 U.S. 611 (1882).

This view is supported by United States v. O'Brien, 391 U.S. 467 (1968), in which the Supreme Court upheld the constitutionality of the "card-burning" law. In O'Brien, the Court held that the record-keeping and receipt functions served by registration certificates and notices of classification create an overriding, cogent, paramount, strong interest in their preservation free from harm. None of these reasons apply to certificates which, because they have been superceded or have been issued by a board having no jurisdiction to issue them, have no current utility.[11/] The Court's identification of important functions served by valid certificates underscores the application to this case of Russell v. United States, supra, in which a material element in the Court's holding was its finding that, with respect to prosecutions under 2 U.S.C. § 192 for contempt of Congress, the importance of the requirement that questions be "pertinent to the subject under inquiry" required this element to be pleaded with special particularity.

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11/ Compare Point III, infra.

C. Failure to Particularize the Statutes, Rules, Regulations, and Directions Referred To

The indictment alleges the existence of certain "rules, regulations and directions" made under the Universal Military Trainin and Service Act, and that the two forms allegedly destroyed and mutilated were issued pursuant to these laws, rules, regulations and directions. It therefore utterly fails to apprise the defendant of the specific statutory or regulatory provisions which authorized the issuance of the forms to him. Apparently, the Director of Selective Service, under authority delegated by the President, is empowered to require the carrying of innumerable certificates of every description, see 50 U.S.C. App. §§ 460(b)(1), 460(c); 32 C.F.R. § 1606.51. The manner of their issuance, recall, cancellation, and even destruction is governed by copious regulatory materials. The indictment fails to set forth the citations of the regulations which permitted the issuance of the certificates here in question, which determined their validity, and which assured their continuing vitality as Selective Service forms which the defendant was required at his peril not to destroy or mutilate. Therefore, it fails to state an offense. Corson v. United States, 147 F.2d 437 (9th Cir. 1945), and United States v. Ferranti, 59 F. Supp. 1003 (D.N.J. 1945), are in point here. In those cases, brought under the World War II price control laws, indictments were dismissed for failure to allege facts sufficient to show the specific regulatory provision involved.

Moreover, while there may be some general agreement upon what constitutes a "rule" and a "regulation," it may well be asked what is a "direction," within the meaning intended by the draftsman of the instant indictment? Section 462(b)(1) makes no reference to a "direction," and there is doubt whether anything so denominated would even have the force of law. See Goodwin v. Rowe, 49 F.Supp. 703 (E.D.W.Va. 1943). Sel. Serv. L. Rep., Practice Manual, ¶¶ 31-35.[12/]

In short, the pleader saved himself the effort of particularized pleading by the device of citing generally the whole body of Selective Service law as the basis for the present prosecution. This course not only invalidates the indictment, but makes it quite doubtful that the grand jury which returned the indictment ever understood of just what they were charging the defendant. See Russell v. United States, 369 U.S. at 769-70.

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12/ See I, F, infra, on the government's bill of particulars.

An additional defect consists in the failure to set forth the portion of § 462(b) allegedly violated by the defendant. While this defect would not ordinarily subject the indictment to dismissal, in this case the possible prejudice to the defendant from a failure to be precise requires that course. In O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967), rev'd on other grounds, 391 U.S. 467 (1968), the court of appeals struck down the appellant's conviction for destruction of his draft card, but remanded the case for resentencing under the portion of § 462(b) which permits punishment of those who do not possess their draft cards. The propriety of such a course was not passed upon by the Supreme Court, but it appears only fair that the prosecution be required to spell out the statute on which it relies in order to guard against the possibility of a switch from one section of § 462(b) to another.

D. Failure to Allege the Manner in Which the Offense was Committed

Under Point IV of this brief, appellant argues that he did not mutilate his registration certificate and notice of classification. This argument rests in part upon common sense, and in part upon constitutional and statutory interpretation principles. The presence of this first amendment issue requires that the government plead the manner in which the defendant allegedl mutilated his selective service certificate. See United States v. Lattimore, supra. Putting a defendant to a criminal prosecution upon allegations insufficient to negative the possibility that free speech guarantees will be interfered with is itself a form of interference with freedom of speech. Dombrowski v. Pfister, 380 U.S. 479 (1965). The principle that the means by which the defendant committed the offense must be pleaded in the indictment has been applied as well in cases not involving first amendment claims. Ornelas v. United States, 236 F.2d 392 (9th Cir. 1956).

E. The Indictment cannot be Saved by Bill of Particulars

The indictment in this case has many failings as a pleading. All of them raise the classic danger that the prosecutor not the grand jury, chose the theory of this case. Put most simply, the defects in the present indictment are such that they cannot be cured by a bill of particulars. Not only is it settled that "a bill of particulars cannot save an invalid

indictment," Russell v. United States, 369 U.S. at 770, but to permit the prosecutor to fill in the gaps subverts a function which the grand jury has expressly been designed to serve since the Assize of Clarendon:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." Ibid.

This case well illustrates the cogency of the Court's position in Russell:

The trial court denied the motion for a bill of particulars and the government did make some half-hearted attempt to cure the vagueness of the indictment by voluntarily filing a bill of particulars. The government's citation of statutory and regulatory provisions was so general as to be ludicrous. A cursory examination of the provisions cited by the government will show that they do not at all inform. More significantly, there is no indication that the grand jury ever knew that these provisions were in issue, as claimed by the government. There is no indication that the grand jury ever understood the manner in which Notices of Classification and Registration Certificates are issued and required to be kept. The prosecutor apparently did not introduce the defendant's selective service file, or any portion of it, into evidence before the grand jury, even

though in his summation, as in his case in chief, he relied on material in the file as essential to proof of elements of the offense. See Tr. 73-88; 337-38. Thus was the role of the grand jury undermined.[13/]

F. Conclusion

Perhaps in an effort to escape from the baffling and overtechnical prolixity which characterized common law criminal pleading, the pleader in this case has fallen into the "formalism of generality" which is not only equally to be condemned, but which poses substantial threats to the defendant's rights to apprisal and to indictment by grand jury. United States v. Seeger, 303 F.2d 478, 483 (2d Cir. 1962).

II. The District Court's Refusal To Grant A Joint Government And Defense Motion To Decertify This Case From The Ready Calendar For The Purposes Of Enabling The Defendant To Bring Himself Into Compliance With The Selective Service Laws And For Negotiations Looking To Dismissal Was An Arrogation To The Court Of The Power Reserved To The Executive Branch And Requires Reversal

This case was set for a day certain, June 5, 1968. Several days before trial, the docket entries reflect that counsel for the United States and counsel for the defendant appeared in open court and jointly moved to decertify the case

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13/ Other averments in the bill of particulars similarly cannot cure the vagueness of the indictment or are set out in such summary fashion as to be noninformative.

from the ready calendar. The purpose of the decertification was to permit the defendant to seek a I-O classification from the Selective Service Appeal Board for the Southern Judicial District of Florida, to volunteer for civilian work, and to obtain a duplicate Registration Certificate and Notice of Classification.[14/] This would obviously take time, but counsel has been involved in several cases in which agencies of the Selective Service System have been receptive to suggestion and assistance from the Justice Department or its representatives in processing claims for deferment or exemption.

The motion to decertify was, however, denied. This denial constituted prejudicial error to the defendant, and requires reversal. As the Fifth Circuit held in United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied sub nom. Cox v. Hauger, 381 U.S. 935 (1965):

> "The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause.
> . . . [T]he courts are not free to interfere with the free exercise of the discretionary powers of the attorneys for the United States in their control over criminal prosecutions."

This holding was reaffirmed in Smith v. United States, 375 F.2d 243 (5th Cir. 1967). Basically, Cox (while the court's holding reached only the relatively narrow question of whether a

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14/ The transcript of the motion is not typed up, but the docket entry should be sufficient for purposes of this appeal. If not, counsel requests a transcript be made.

United States Attorney could be required by the court to sign an indictment voted by the grand jury) reaffirms the prosecutorial discretion which is a fundamental element of federal criminal law, particularly in a time of crowded trial calendars, and particularly when grave issues of public policy committed by law to the Executive Branch are involved in the decision to discontinue a case. Both these elements, it will be seen below, are present here.

It is common knowledge that trial calendars in the United States District Court for the District of Columbia are clogged. The "time and resources of investigation, prosecution and trial" are considerations which the prosecuting attorney is, from the point of view of his own office, uniquely competent to weigh. Pugach v. Klein, 193 F.Supp. 630,635 (S.D.N.Y. 1961); see also Smith v. United States, 375 F.2d 243, 248 (5th Cir. 1967).

Another factor, just as important, is present here. The Selective Service law is designed to fill the army, not the jails.[15/] Compliance and not punishment is its goal. Congress has in terms insusceptible of doubt declared the right of young men of conscience to serve, as an alternative to service in the armed forces, in civilian work contributing to the national health, safety and interest. 50 U.S.C. App. § 456(j). Lawyers in selective service cases across the land can attest that when

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15/ Selective Service System, Legal Aspects of Selective Service, 42 (1963).

a defendant who is technically guilty of some selective service offense (usually refusal to submit to induction) indicates that he is willing to reconsider and bring himself back into compliance with the law, the government looks favorably upon him and will sometimes permit him to report again. If he does, the prosecution will usually be dismissed. The exercise of such discretion by the Attorney General[16/] is entirely proper, for it is to the Executive Branch and specifically to the President that the Congress has committed (wisely or not) the power to conscript and to administer the system of conscription. 50 U.S.C. App. § 460(b). The widespread dissatisfaction with the draft and the mounting number of prosecutions may make it imperative, in the national interest, to dismiss cases in which a conviction would offend the sense of justice of many. "All must be aware now that there are times when the interests of the nation require that a prosecution be foregone." Smith v. United States, supra, at 247, quoting from the concurring opinion of Brown, J., in United States v. Cox, supra at 182. Can it be doubted, for example, that a district judge would abuse his discretion in refusing to decertify an espionage case from the ready calendar after the government and the defense had jointly moved to do so upon the ground that trial of the case would prejudice the foreign relations of the United States? See United

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16/ This discretion is now limited by 50 U.S.C. App. § 462(a).

States v. Egorov, 232 F. Supp. 732 (E.D.N.Y. 1964); Williams, One Man's Freedom, 321-22 (1962).

It may be argued, however, that a federal district judge must approve every dismissal of a case, F.R.Crim.P. 48(a), and that the power to approve or disapprove a decertification is surely compassed within that broader power or at least inferrable from its existence. This argument[17/] would, however, violate accepted principles of construction and would raise serious constitutional questions. First, the power of a federal judge to approve or disapprove a nolle prosequi did not exist at common law, and is an innovation of the Federal Rules. Such an exception, it may be suggested, should not be broadened beyond its literal terms by using the provision of F.R.Crim.P. 48(a) as a datum point for reasoning by analogy. Second, the Fifth Circuit noted in Cox that a reading of Rule 48(a) which trespassed upon the traditional discretion of a prosecutor would call into question the constitutionality of the Rule. 342 F.2d at 172. This latter observation calls into play the root purpose of Rule 48(a), "to prevent harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy." United States v.Cox , supra, at 171. The salutary principle of preventing harrassment should, in logic and in law, limit the operation of the rule which it underlies.

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17/ Which, it must be said, lacks for logic. See Powell, The Right to Work for the State, 16 Colum. L. Rev. 99, 110-12 (1916).

Cessante ratione legis, cessat et ipsa lex.

Nor is the prosecutor's discretion countermanded by any rule of court, properly interpreted. District Court Rule 87(g), as it existed at the time of the motion to decertify, provided only that there is to be a ready calendar to which the United States Attorney is to certify cases as ready for trial. The rule does provide that "Once a case reaches the Ready Calendar it will remain there until tried," but this provision must not, as set out above, be interpreted so as to rob the United States Attorney of a discretion which the consistent course of federal practice, and the most imperative demands of the separation of powers doctrine, repose in him. The power of the United States Attorney over pending cases brought by his office, it bears iterating, may be tampered with only in the interest of preventing harassment of defendants through multiple prosecutions, or upon the ground that some clear federal right has been violated in the exercise of his discretion. See Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967).

For the foregoing reasons, it was error for the district court to deny the motion to decertify.

III. Since The Defendant's Local Selective Service Board Had Lost Jurisdiction By Virtue Of Errors Of Law, The Defendant Could Not, As A Matter Of Statutory Construction And Constitutional Law, Be Compelled To Preserve His Notice Of Classification And Registration Certificate Free From Harm.

Extensive evidence was adduced before the trial judge on the issue of the defendant's relationship with his selective service board. This evidence was relevant to the validity of the certificates which the defendant had allegedly mutilated. Briefly, it became clear in the court below that the defendant's selective service board lost jurisdiction over him -- in the sense in which the term "jurisdiction" has come to be used in selective service law[18] -- and therefore became powerless to require compliance with its commands through the criminal law. This argument rests upon some well-accepted, though commonly denominated recondite, principles of selective service law.

The "certificates" referred to in 50 U.S.C. App. § 462(b) are not mere blank forms, but rather official documents validly and duly inscribed with notations having relevance to the processing of registrants. United States v. Naughten, 195 F.Supp. 157 (N.D. Calif. 1961). The Supreme Court has made clear that the validity of the "card-burning" law rests upon the value to the Selective Service System of the forms required not to be mutilated or destroyed. United States v. O'Brien, 391 U.S. 367,

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18/ See generally Estep v. United States, 327 U.S. 114 1946), discussed infra.

378-81 (1968). The indictment recognizes this fact explicitly when it alleges (although the government did not offer any proof on this score at trial) that the certificates were issued pursuant to the law and regulations. This concession was then firmly established in the government's bill of particulars, which set out that the regulations under which the certificates were issued constitute a body of material no less broad than almost the entire body of statutory and regulatory provisions on registration, classification and processing of registrants. The government cited 32 C.F.R., Parts 1611, 1612, 1613, 1617, 1621, 1622, 1623, and 50 U.S.C. App. §§453 and 460. If the certificates were not issued pursuant to this body of law and regulations, if they were not lawful certificates of the Selective Service System, then the prosecution must fail.[19/]

The analysis which follows shows that the certificates in issue in this case were not lawful certificates, and, in addition, that the defendant was under no legal obligation whatever to carry them or keep them harmless from mutilation and destruction.

A. Judicial Review of Selective Service Decisions

The statute under which the defendant was indicted, the Universal Military Training and Service Act (now the Military Selective Service Act of 1967), provided in § 10(b)(3) that

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19/ The government also stated that the defense might prove at trial that the certificates were not validly issued.

the decisions of local boards, appeal boards and the President, within their respective jurisdictions, were to be "final." The Supreme Court, in Estep v. United States, 327 U.S. 114, 120-23 (1946), interpreted this language[20] to mean that there could be no judicial review of Selective Service decisions unless the boards acted in excess of their jurisdiction. That is, all judicial review of Selective Service decisions is in the nature of review on collateral attack. The Court's discussion in Estep is worthy of note: Construing §10(b)(3), the Court noted that decisions of the System are made "final" "within their respective jurisdictions." The Court went on to say:

> "It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution...." 327 U.S. at 120.

Thus, the concept of jurisdiction is in part geographical. But the Court went on to hold that any act in violation of the statute or regulations was beyond the "jurisdiction" of draft boards.[21] Subsequent cases have refined this concept of "losing jurisdiction."

How does the System "lose jurisdiction?" First, the System loses jurisdiction when it classifies a registrant with "no basis in fact." Estep, 327 U.S. at 121-22. A "basis in fact" may not be provided by mere supposition and speculation. Dickinson v. United States, 346 U.S. 389, 395 (1953). If a

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20/ As it appeared in the predecessor law, the Selective Training and Service Act of 1940.

21/ Justice Frankfurter's anguished dissent from this semantic tour de force is worth reading. 327 U.S. at 134.

registrant presents evidence that he is entitled to a certain classification (minister of religion (Class IV-D) or conscientious objector (Class I-0)), the board may not deny it to him unless it builds a record of credible fact in support of its action. See United States v. Washington, 392 F.2d 37 (6th Cir. 1968).

Second, the system loses jurisdiction when it acts in derogation of the registrant's rights under the regulations or statute. For example, if a registrant asks for a Form 150 (Special Form for Conscientious Objectors) so as to make a claim for placement in Class I-0, the board loses jurisdiction if it denies his request. Boswell v. United States, 390 F.2d 181, 183 (9th Cir. 1968). If the board is shown to have violated the regulations, the government must, in a criminal prosecution prove "beyond a reasonable doubt," as an element of the offense, that the denial did not prejudice the registrant. United States v. Freeman, 388 F.2d 426 (7th Cir. 1967).

Third, the board loses jurisdiction if it gives the registrant misinformation about the law, or misinforms him as to his rights in such a way as to prejudice him. United States v. Bryan, 263 F. Supp. 895 (N.D. Ga. 1967); Striker v. Resor, 283 F.Supp. 923 (D. N.J. 1968); In re Shapiro, No. 51-67, unreported (D. N.J. 1967).

B. Application of Law to This Case

If a local board in Pennsylvania sent appellant a

notice of classification or registration certificate, he would surely be free to tear it up and throw it away under the rule of Estep and as a matter of common sense. But Estep holds that every loss of jurisdiction is, in the eyes of the law, equivalent to every other loss of jurisdiction. Hence that the appellant's conviction must be reversed if he can show, as he does in the next section of this brief, that the board acted without jurisdiction in issuing his certificates to him. This reading of the jurisdictional language of Estep in a draft card case is supported by United States v. Hertlein, 143 F.Supp. 742, 746 (E.D. Wisc. 1952). In Hertlein, the local board issued the defendant a notice of classification while his classification was on appeal to the appeal board. The court held that the illegality of the board's act in classifying the registrant while his case was on appeal absolved him from the requirement of possessing the notice. The same principle applies to a prosecution for mutilation and destruction, which is designed to protect related governmental interests.[22/] That is, the Selective Service System cannot, through the prosecutorial agencies, seek to declare a defendant a felon, and place his liberty in jeopardy for having mutilated or destroyed a card issued without any legal warrant. The same result would obtain in the case of a registration certificate issued by the board when it did not have jurisdiction to do so, or in an unauthorized manner. The argument really boils down

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22/ See generally United States v. O'Brien, supra. Drenitzke, supra, 1 Sel. Serv.L.Rep. 4029 (1968).

to this: If a board suddenly issued a registration certificate to an 85-year old man, or reclassified a minister I-A without any reason for doing so, could the government try to send the old man or the minister to prison for throwing away the registration certificate or the new notice of classification?[23] In the case of a notice of classification, the argument is further strengthened by reference to the possession regulation, 32 C.F.R. §1623.5, which requires a registrant to carry only a current "valid" notice of classification. Therefore, if a notice of classification or registration card is improperly issued, a conviction of the registrant for destroying it may not be sustained.

But there is more at stake than issuance of cards without lawful authority. It is clear that when a local board loses jurisdiction, it loses as well the right to use the criminal process to vindicate its authority at all in matters of classification and processing. This statement is supported by the recent case of United States v. Federspiel, 1 Sel.Serv.L.Rep. 3042 (N.D. Ohio 1968). In Federspiel, the defendant was ordered by his local draft board to report for induction. He went to the induction center, and went through all the steps up to taking the symbolic step forward signifying entrance into the armed forces. When questioned by the FBI at the induction station as to the reason for his refusal he said he was a conscientious objector. His local board thereafter sent him a Form 150 (Special Form for Conscientious Objectors), which he filled out and returned. The board declined to reopen Federspiel's classification and did not

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[23] See Oesterich v. Selective Service System, 393 U.S. ___ (1968).

give him the right to appear before it and discuss his classification. This action, the court held, deprived the board of jurisdiction because it was a violation of the regulations and of due process of law. The court held that this error absolutely precluded the criminal prosecution of the defendant for his refusal to step forward. That is, even though the crime of refusing to submit was arguably complete at the time the defendant refused to step forward, the board's subsequent denial to the defendant of due process required acquittal of the defendant. The court therefore granted the motion for judgment of acquittal and discharged the defendant. The same result must obtain if, for example, a registration certificate or notice of classification is validly issued and then the board loses jurisdiction over the defendant; the board cannot, until it again begins to comply with the constitution, laws and regulations, invoke the aid of the criminal process to vindicate its authority over the defendant in the matter of possessing, free from harm, his notice of classification and registration certificate.

To similar effect is the recent Second Circuit case of United States v. Stafford, 389 F.2d 215 (2d Cir. 1968). In Stafford, the defendant took a letter claiming conscientious objector status with him to his local board and then to the induction center (no one having been at the local board) on the morning set for his induction. He refused to submit to induction. The local board subsequently met and denied his claim to conscientious objection. The court remanded the case for an inquiry

to determine whether the local board denied the claim because it was untimely because not made earlier, in which case the conviction would have to be set aside. In making this determination the court expressly rejected the view of the district judge that the refusal to submit to induction "already constituted [the defendant] an offender" and that his claim was simply not relevant to his prosecution for the refusal. In Stafford, there was no question that the board had jurisdiction to issue an induction order, and that the induction order was valid when issued. But the board lost jurisdiction to exact compliance with the order, the court held, as soon as the defendant filed his claim, and did not regain jurisdiction until proper consideration was given to the claim. The same question was in issue in Briggs v. United States, 397 F.2d 370 (9th Cir. 1968); Oshatz v. United States, 404 F.2d 9 (9th Cir. 1968).

This analysis is entirely in accord with that made in the majority opinion in O'Brien, supra. There the Court listed a number of justifications for requiring a registrant not to mutilate or destroy his registration certificate. See 391 U.S. at 376. These justifications do not apply if the board is without jurisdiction, because it could not under any circumstances issue a valid order to report or validly require anything of the registrant until it once again begins, in accord with the law, properly to process and classify him. Then, and only then do the justifications adduced by the court--having to do with administrative convenience--come into play. Then, and only then, can the board

validly say that the registrant is not in possession of the certificates the law requires him to carry. At that point, the board could appropriately require the registrant, on the pain of his being declared delinquent, to begin possessing the certificates. It might even be able to ask the government to initiate a criminal prosecution, although it might have difficulty proving the element of intent.

It would be unconstitutional to permit prosecution of the defendant for destroying his certificates if there is no valid governmental interest in his having and keeping them. This is a necessary corollary to the holding in the O'Brien case, see 391 U.S. at 378-81, because the "governmental interest" referred to by the court in that case would no longer be present.[24/]

A statute which is applied to suppress communicative behavior is unconstitutional as thus applied if there is no substantial or strong governmental interest in stopping the behavior. O'Brien, 391 U.S. at 376-77. The O'Brien case upheld the statute only on its face and as applied to cases like O'Brien; there was no contention in that case that the board lacked jurisdiction of O'Brien at the time he burned his registration certificate.

C. Why This Conviction Must be Reversed.

The defendant's Selective Service file is in the record with the government's consent, Tr. 75. The file shows that the board lost jurisdiction of the defendant on July 14, 1966, and has

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24/ See Point IV, infra.

not regained it. This assertion is fortified by a concession by a high Justice Department official, contained in the defendant's Selective Service file, that the defendant was entitled to a lower classification than the board gave him on that day.

The defendant's Selective Service file shows that in the Fall of 1964, after his initial registration in May 1964, he entered Pomona College, Claremont, California. He was deferred in Class II-S (student) during the academic year 1964-65. He was granted a further II-S deferment beginning in the Fall of 1965 to run until the Fall of 1966. In the Spring of 1966, he requested a Special Form for Conscientious Objectors, SS$ Form No. 150, to claim conscientious objection. (Selective Service File, Item 34). He also made clear at the time (Item 28) that "In accordance with the moral commitment I feel inherent in this position, I wish to leave school and begin my alternative service immediately (i.e., during summer of 1966)." That is, he felt that in order to manifest the total extent of his moral position in opposition to participation in war, he had at the same time to undertake a program of two years of alternative service. Such service is required of all conscientious objectors, but they need not perform it until the time when they would have been drafted if they had been I-A. 32 C.F.R. §1660.20. Many conscientious objectors never have to serve at all, just as many registrants never have to serve in the army at all. Landry then filed the Form 150 and supporting letters. In these materials, the strength and sincerity of his

commitment cannot be doubted. He describes in brief compass his initial commitment to the Catholic faith, which according to the teaching of many Church fathers makes conscience the individual arbiter of good and evil, and his rejection of the dogma of the Church while retaining a commitment to conscience as the expression of "godness." He then describes the solemn commitment to nonviolence as a means of resisting evil and his absolute rejection of forcible resistance is a permissible means of resolving conflicts. Compare United States v. Seeger, 380 U.S. 163 (1965).

Landry also secured the filing of a student certificate showing that he had been granted a leave of absence to perform his alternative service. The effect of this action on his part was to secure immediate action on his conscientious objector application. The board could not consider the application until it had some basis for ending his II-S deferment, because the II-S deferment is a "lower" classification than the I-O which Landry sought, and the Selective Service regulations require the board to place the registrant in the lowest class to which he is entitled. 32 C.F.R. §1623.2.

Landry also filed a letter from a professor attesting to his sincerity and a letter from the Church of the Brethern showing that he had been accepted in the Brethern's alternative service program. The board met and considered Landry's application, and gave him a personal appearance on July 14, 1966 as required by the regulations. 32 C.F.R. Part 1624. At this meeting, the board voted to classify him I-A.

In doing so, the board lost jurisdiction, for there was in the file no basis in fact for denial of the I-O classification and the board did not find and record some evidence which would indicate that he was not entitled to the classification he sought. Dickinson v. United States, 346 U.S. 389, 395-96 (1953); United States v. Washington, 392 F.2d 37 (6th Cir. 1968). Landry's claim clearly met the standards set out in United States v. Seeger, 380 U.S. 163 (1965), and it was up to the board to find evidence to rebut his claim of sincere conscientious objection. In doing so, it ought to have kept in mind the Court's admonition in Seeger that:

"In such an intensely personal area, of course, the claim of a registrant that his belief is an essential part of a religious faith must be given great weight." 380 U.S. at 184.

The board's minutes of that date (Item 14) contain no basis for rejecting the defendant's claim,[25/] and the notation on page 8 of the defendant's classification questionnaire (not numbered as an Item but in the defendant's Selective Service file) shows that the clerk noted respecting the Form 150 only that "Has participated in anti-Viet Nam demonstrations...." This would not only be no basis for denial of a I-O classification, but if used as a basis for classifying the registrant would invalidate the board's action. See Sicurella v. United States, 348 U.S. 385 (1955). Of course, if a registrant's opposition to participate in

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25/ As, under the better view, they should. See United States v. St. Clair, F.Supp. , 1 Sel.Serv.L.Rep. 3224 (E.D. N.Y. 1968).

war is "political" rather than religious, he may be denied the conscientious objection exemption, but the political objection must be the sole basis for the claim before it becomes a disqualification. United States v. Seeger, 380 U.S. 165, 186 (1965); Fleming v. United States, 344 F.2d 912, 915-16 (10th Cir. 1965).

If the court should be of the view that the board did not lose jurisdiction on July 14, 1966, it clearly lost jurisdiction on August 10, 1966. On August 9, Landry wrote his local board to ask about volunteering for civilian work by filing SSS Form 151. This form states that the registrant is willing to perform two years of civilian service at any time convenient to the government and waives all appeal rights in the event a I-O classification is granted. The regulations state that "any registrant ...who claims eligibility for Class I-O, may volunteer at his local board for civilian work contributing to the national health, safety and interest." 32 C.F.R. §1660.10. Form 151 is the official Selective Service form for complying with this regulation, and all such forms are a part of the regulations, according to 32 C.F.R. §1606.51. The board clerk, however, instead of informing Landry of the provisions of the regulations, wrote him that he could not have a Form 151 for filing until and unless he was classified I-O. This was a clear error of law. It deprived Landry of the opportunity to make a clear and unequivocal demonstration of his sincerity in applying for conscientious objector status. Such errors, tending to the prejudice of the registrant

by misleading him, United Statss v. Bryan, supra; Striker v. Resor, supra; In re Shapiro, supra, or by denying him the opportunity to file a form in support of claimed classification, Boswell v. United States, 390 F.2d 181 (9th Cir. 1968), deprive the System of jurisdiction and invalidate its action.

C. Conclusion.

For the foregoing reasons, the conviction must be reversed and the cause remanded with directions to enter a judgment of acquittal, or in the alternative, with directions to hold further hearing upon the matters discussed in this section of the brief.

IV. The Court Instructed The Jury Improperly On The Definition Of "Mutilation" Under Sec. 462(b)(3), And In Any Case Should Have Directed A Judgment Of Acquittal For Want Of Proof That The Defendant Mutilated His Certificates

Black, Law Dictionary 1172 (4th Ed. 1951) defines mutilation as follows:

> "As applied to written document,'. . . this term means rendering the document imperfect by the subtracting from it of some essential part, as, by cutting, tearing, burning, or erasure, but without totally destroying it."

This definition was submitted to the Court as a requested instruction. However, the Court added to the Black definition:

> "The fact that a document, once mutilated, may be reassembled or reconstructed does not in and of itself detract from the fact that it has been previously mutilated. The objective of the statute is to preserve these documents intact. As applied

> to this case, if you find that either or both of these documents were [sic] mutilated by the tearing of an essential part, thereby rendering the document imperfect, then the mere fact that either document may be pieced together again later does not necessarily mean that it was not mutilated." Tr. 385-86.

The Court also overruled an objection to the government's summation, in which government counsel analogized the "mutilation" of a draft card to the "mutilation" of a picture or painting, and the Court said that it was the "same principle." Tr. 356.

The instruction as given was erroneous. The basis for this conclusion appears from a close reading of the statute. Sec. 462(b)(3) reaches he who "forges, alters, knowingly mutilates, or in any manner changes any such certificate . . . ." A "certificate," it will be recalled, is not a blank form, but a fully-executed and duly-inscribed document. See United States v. Naughten, supra. The Supreme Court, interpreting §462(b)(3) in O'Brien, held that the various offense-definitions must be read together as part of a common Congressional plan to preserve selective service certificates in a form useful for their intended purposes of record-keeping and identification. As the Court noted in O'Brien: "Further, a mutilated certificate might itself be used for deceptive purposes." 391 U.S. at 380. Defining the various terms in §462(b)(3) to protect related interests is also in accord with the maxim of construction noscitur a sociis, the meaning of a word may be known from accompanying words.

The O'Brien reference to "deceptive purposes" occurs in the midst of a discussion which is also important here. The Court, enumerating the reasons for upholding the card-destroying ban as applied to O'Brien, who totally destroyed his registration certificate, emphasized the many functions of the System which might be hampered by registrants whose cards are totally destroyed. The Court says significantly:

> "The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their personal possession at all times, as required by the regulations is of no concern under the 1965 Amendment, so long as they do not mutilate or destroy the certificates so as to render them unavailable." 391 U.S. at 380-81. (emphasis added)

Thus, any definition which does not equate mutilation with conduct which so rends, tears, or subtracts from the certificate as to make it unavailable or unsuitable for its intended purpose is contrary to the Court's interpretation in O'Brien.

There is more than a problem of statutory interpretation, however, in departing from the O'Brien Court's relatively narrow reading of the statute. In O'Brien the defendant (who had totally destroyed his registration certificate) was convicted despite the admittedly communicative character of his conduct because his first amendment rights of symbolic speech had to give way before a manifest governmental interest in preserving selective certificates free from harm, so that they might fulfill their

receipt and record-keeping functions. But when a certificate is rendered into four pieces, and can be and is readily reassembled for its intended purpose, these interests have not been defeated and the statute would be unconstitutional if applied to punish the conduct of one who had dealt with his certificates in that manner. Therefore, "mutilation" must be read narrowly "in the candid service of avoiding a serious constitutional doubt." United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring.[26/]

The judge's instruction, given the discussion above, was virtually a direction of verdict of guilty on the issue of mutilation. The evidence of Agent Blazek that the registration certificate could be reassembled certainly provides the predicate for a judgment of acquittal as to it, and it must be held as well that there was a failure of proof of mutilation as to the notic of classification.

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26/ There is a common sense aspect to this problem. Selective Service certificates are larger than credit cards and most other cards a man carries in his wallet. If, in order to be able to carry his certificates with ease, a registrant cut them in half and then taped them with clear plastic tape -- to form a durable hinge along which they might be folded -- few would say that he should be found guilty of a felony. This example illustrates that it is the rendering unavailable and not the bare act of cutting, which constitutes the gravamen of the offense here in issue.

V. The Trial Court Erred In Charging The Jury On The Meaning Of "Wilfully" As Applied To This Case.

The indictment in this case charged the defendant with "knowingly and wilfully" mutilating or destroying his draft cards. Although the statute involved uses only the term, "knowingly," and does not also use the word "wilfully," the criminal provisions of the draft law have always been read as requiring proof of wilfulness. See, e.g., United States v. Hoffman, 137 F.2d 416, 419 (2d Cir. 1943), Graves v. United States, 252 F.2d 878, 881-82 (9th Cir. 1958) and United States v. Rabb, 394 F.2d 230, 232 (3d Cir. 1968). And when passing for the first time on the exact statute involved in this case the Supreme Court used the terms "knowingly" and "wilfully" interchangeably, further indicating that the statute involved requires wilfulness as an element of the offense. United States v. O'Brien, 391 U.S. 467 (1968).

Moreover, the instant case is exactly like Morissette v. United States, 342 U.S. 246 (1952), in that: (1) the statute in both cases states the offense need only have been done "knowingly"; (2) the indictments in both cases alleged the offenses were done "knowingly and wilfully." The Supreme Court held some element of wilfulness to be required in Morissette; likewise, it is required in the instant case.

The court below erred by incorrectly instructing the jury as to the definition of "wilful."

The trial judge instructed the jury that they could find the defendant guilty if they found merely that the defendant had the specific intent to mutilate or destroy the Selective Service Forms involved:

> "Now, when the indictment alleges that the defendant 'wilfully and knowingly' accomplished the mutilation or the destruction of the documents in question, it means that the defendant at the time that he did mutilate or destroy -- if you find that he did so -- knew that the document which was being mutilated or destroyed was in fact a document issued by the Selective Service System and that he had the specific intent to mutilate or destroy that document with the knowledge that it was a Selective Service certificate and with the intent to accomplish the objective of destruction or mutilation. It means that he did the act knowingly, consciously and on purpose with the specific intent to accomplish the objective of mutilation or destruction, and that the act was not performed accidentally or under the false impression that these documents were other than documents issued under the Selective Service Act. If you find that the defendant did mutilate or destroy either one or both of these documents wilfully and knowingly, that is, intentionally and on purpose and not by unintention or by accident, then the sole remaining question for you to determine is what was the intent with which he did so. If you find that he had the specific intent to destroy or mutilate, then you may find him guilty of these charges. If that specific intent is lacking, you must find him not guilty." Tr. 386-87.

Defense counsel, relying upon a consistent and unbroken line of Supreme Court cases, requested that the court charge as follows:

"Ladies and Gentlemen, our legal system does not condemn any man, or permit him to be found guilty of a serious offense, unless the act which the law prohibits is done with a bad intent. That is, unless you find both that the defendant did the act charged in the indictment, and that he did it 'wilfully and knowingly', you must acquit the defendant.

"'Wilfully' and 'knowingly' are words which describe a particular state of mind. An act is done 'wilfully' if done voluntarily and intentionally, with specific intent to do something which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"'Wilfully' means with design, with some degree of deliberation. The word 'wilfully' as used in the indictment in this case implies not only knowledge of the thing which the statute prohibits but a determination with a bad intent to do it. The word means not merely 'voluntarily' but with a bad purpose. It is frequently understood as signifying an evil intent without justification or excuse.

"Put another way, ladies and gentlemen, wilfully means that with evil motive and want of justification and a conscious purpose to do that which the law condemns, taking account of all the surrounding circumstances.

"Another definition of wilfully is that it means 'an evil motive to accomplish that which the statute condemns.'"

The charge requested by the defense finds full support in all Supreme Court cases on this issue. In United States v. Murdock, 290 U.S. 389, 394-95 (1933), the Court stated that wilfully generally means: "an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act." The Supreme

Court restated the Murdock holding in Spies v. United States, 317 U.S. 492, 495-97 (1943), and went on to say that wilfully means not merely voluntary, but with a bad purpose, and that the word frequently signifies an evil intent without justification or excuse. The same point was made in Screws v. United States, 325 U.S. 91, 101 (1945): "An evil motive to accomplish that which the statute condemns [is] a constitutent element of the crime."

Morissette v. United States, 342 U.S. 246 (1952), puts the problem in sharpest focus. Morissette was a prosecution for stealing shell casings from a Government reservation. Although the indictment charged that the defendant did "knowingly and wilfully" steal the casings, the trial judge charged that the jury should only consider whether the defendant took the casings with the intent to take them. This is identical with the District Judge in the instant case charging that it was a knowing and wilful mutilation if appellant intended to tear the draft cards. The charge used in Morissette was held to be improper because it failed to include reference to bad purpose or evil intent; likewise, the charge used in the case at bar is equally improper.

See also, Hartzel v. United States, 322 U.S. 680 (1944); Potter v. United States, 155 U.S. 438 (1894); Felton v. United States, 96 U.S. 699 (1877).

Furthermore, the charge requested by the defense was in accord with the most recent definition of the term "wilfully" as used in the context of a prosecution for violation of the crimina

provisions of the Selective Service law. In United States v. Rabb, 394 F.2d 230 (3rd Cir. 1968), a conviction for failure to report for induction was reversed on the grounds of the trial court's instruction on wilfulness. The court of appeals suggested use of language along the following lines on re-trial:

> "The word 'wilfully' as used in the crime charged means that the act (oromission) was committed (or omitted) by the defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident or in good faith."
>
> "A failure to act is 'wilfully' done, if done voluntarily and purposely, and with the specific intent to fail to do what the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law." Jd. at 232. 27/

Sound policy considerations support the continued adherence to the bad purpose-evil intent standard of wilfulness in a prosecution for mutilating draft cards. The commentators suggest that the greater the moral turpitude or culpability of a particular crime, the more compelling it is to follow the bad purpose-evil intent standard of wilfulness. Perkins, Criminal Law 688 (1957). Surely there can be no doubt that a draft card mutilation case, with its undercurrent of strong -- even inflamed -- emotional feelings, involves conductwhich at least a large segment of our society would regard as being highly culpable.

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27/ There are admittedly cases from the lower Federal courts to the effect that wilfulness means only intentionally or purposely as distinguished from accidentally or negligently. Sec, e.g., McBride v. United States, 225 F.2d 249 (5th Cir. 1955). However, such cases are (1) an aberration from the consistent Supren Court position in Murdock, Spies, Screws, and Morrissete; and (2) contrary to the most recent definition of willfulness in a Selective Service prosecution, i.e. United States v. Rabb, supra.

See, e.g., Comments of Senator Thurmond and Congressman Rivers at 111 Cong. Rec. 19746, 20433 and 111 Cong. Rec. 19871-72. With feelings running high, it is wise to limit the use of the severe sanctions for card mutilation to cases where there is the clearest proof of wilfulness of the bad purpose-evil intent type.

Moreover, to impose this higher standard of proof of wilfulness on the Government is fully consistent with the efficient administration of the Selective Service System. As the Supreme Court pointed out in O'Brien, the gravamen of the card-mutilation ban in 50 U.S.C. 462(b)(3) is the desire to keep these selective service documents available for the record-keeping functions that they serve. 391 U.S. at 381. The System has a way to force the defendant in this case or any other registrant to possess and/or preserve his Registration Certificate and/or Notices of Classification in a form that protects the integrity of the System's records. This can be done by way of "delinquency proceedings," as set out in 32 C.F.R. Part 1642. The delinquency regulations are a means of compelling a registrant, upon pain of being placed in the highest priority for induction in his board, to bring himself into compliance with any requirements of the draft law or regulations, such as preserving or possessing documents that serve the record-keeping functions of the System. The delinquency regulations are, therefore, very much like civil contempt proceedings used to compel compliance with lawful local board commands. Thus, it is not a question of the defendant not being amenable at all to any procedural means to remedy his alleged failure to comply with law.

Given this procedural device which fully protects the governmental interests in this case, it is all the more clear that the criminal sanctions of 50 U.S.C. 462(b)(3), carrying a possible penalty of five years and $10,000 fine per count, and with a sentence of 1-3 years imposed in this case, should be reserved for cases where there is the strongest possible proof that the defendant behaved with evil intent and with total want of justification. In cases where such proof is absent, such as when a card is accidentially mutilated, or carelessly mutilated, or as in this case, possibly mutilated but with no premeditation, the delinquency regulations are more than adequate to protect all legitimate interests of the Selective Service System.

Both of these policy considerations have been invoked to aid in the definition of wilfulness in tax evasion offenses. Weighing the culpability of the crime was the technique used in Spies v. United States, 317 U.S. 492 (1943). The Court contrasted wilful as used in a tax misdemeanor and the same term as used in a tax felony, stating that for the greater offense, "we would expect wilfulness to include some element of evil motive and want of justification." Id. at 498. See also, United States v. Ill. Cent. RR Co., 303 U.S. 239, 242 (1938).

Also involved in Spies was the fact that the Government had alternative less extreme means of collecting tax revenues, such as administrative assessment of intent and penalties; thus, wilfully was defined as inculding bad purpose and evil intent so

that felony prosecutions could be preserved as the capstone of a complete system of sanctions. 317 U.S. at 495-97. As discussed above, the Selective Service System also has alternative less extreme methods to force compliance with its procedures, i.e. the delinquency regulations. Therefore, as in the area of tax offenses, wilfully should be limited to cases of bad purpose and evil intent.

Clearly, when the word wilfully should be defined as including bad purpose and evil intent, it is reversible error to instruct the jury to the contrary, as was done by the trial court below. Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953).

VI. The Prosecutor's Rebuttal Summation To The Jury Was Prejudicially Inflamatory, Went Beyond The Evidence And Issues In The Case, And Exceeded The Bounds Of Defense Counsel's Summation.

This case was not factually complex. Its disposition, if the arguments of counsel are examined, turned upon the jury's view of mutilation (as defined by the Court) and upon whether the jury believed the certificates to have been "wilfully" destroyed or mutilated. The initial closing addresses of counsel to the jury made these issues reasonably clear. It bears pointing out that this judicial district follows that practice of permitting the government to open and close to the jury on final argument.

The government's initial effort takes up seven and one-half pages in the transcript and lasted less than twenty minutes. It is a fairly straightforward presentation of the evidence and the issues. The one, and only one, chance which the defense had to address the jury in closing argument consumes about eleven pages of transcript. Then, government counsel addressed the jury with remarks taking up about sixteen pages in the record. His lengthy recital would not be objectionable if it were confined to the matters raised by defense. But it was not. Therefore, its undue length was unfair and an abuse of the privilege of opening and closing. See Annot., 93 A.L.R. 2d 273 (1964).

Prejudice to the defendant came, however, from the prosecutor straying beyond the scope not merely of the defense

summation but beyond any issue permissibly in the case. At his most fulsom the prosecutor said:

> "And I think that this case is a classic example, provides a classic example of the contract between the legitimate, the lawful, the peaceful expression of your ideas, and the illegal, the unlawful and the illegitimate expression of your ideas . . . . We've had too much of that, ladies and gentlemen, only recently. We can't tolerate such conduct, on his part or on the part of anybody else . . . . I'm going to quote to you something from the Washington Post, from an editorial, and it is this: 'Those who adovcate taking law into their own hands, however, should reflect more on the moral course they are pursuing than on these laws. They are advocating government by pressure and not by law, decisions influenced by mobs and not by reason . . . . [T]hose who advocate extreme steps because of their concern about what they regard as denials of personal liberty invite retaliation of a kind even more destructive of personal liberties and of the right to dissent.'"

This rhetoric, combined with the statement (not supported by the record and in violation of the Court's instructions) that the defendant "made the choice . . . to violate the law," was of great potential impact, particularly given the civil disorders which the city had only recently undergone.

The defendant was on trial for a relatively technical offense. The gist of his defense before the jury was that on no rational ground could his conduct be said to have been wilful, and that he could not be considered to have "mutilated" his certificates (Point IV, supra). The trial judge's repeated admonitions to defense counsel to confine the introduction of evidence to these issues were heeded. Other weighty defenses were, one will assume properly, kept away from the jury for decision by the

Court as questions of law. The defendant was not on trial for anything so vague, and yet so foreboding, as "threaten[ing] to destroy a society built on the rule of law," or for seeking to impose rule "by mobs and not by reason." This case, it is submitted, should be governed by Handford v. United States, 249 F.2d 295, 298 (5th Cir. 1958). There, as here, the comments of the prosecutor had nothing to do with the narrow issue raised by the indictment. In the exerpt quoted above, and when, grossly misstating the record, he told the jury that the defendant had admitted making his commitment by tearing his certificates just as his friends had made their commitment by burning theirs, the prosecutor fell afoul of the rule in Dunn v. United States, 307 F.2d 883, 885-86 (5th Cir. 1962) that it is "improper for counsel . . . to make unwarranted inferences or insinuations calculated to prejudice the defendant."

This attempt to associate the defendant with organized lawlessness and mob rule, to "substitute a feeling of collective culpability for a finding of individual guilt,"[28] is at war with sentiments which many Americans came to share as judges and prosecutors conducted their ferocious assault upon aliens and Jeffersonians under the Alien and Sedition Law, and which later led the Congress to expiate our feeling of national guilt by making appropriate reparations. Compare Lilburne's Trial, 3 How. St. Tr. 1315 (1637-45).

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[28] United States v. Bufalino, 285 F.2d 408, 417 (2d Cir. 1960).

Finally, the rebuttal summation is filled with prejudicial conclusory assertions concerning the defendant's guilt:

> "He had that specific intent." Tr. 359
>
> "He wanted publicity, so he speaks to a newspaper reporter." Tr. 359.
>
> "There's no question but that he did the act [of tearing and destroying.]" Tr. 363.
>
> "This was a deliberate, purposeful, knowing act on his part. It was his commitment." Tr. 363
>
> "We submit to you that the defendant here deliberately planned to violate the law." Tr. 365.
>
> "You heard him say he made the choice, he made the choice to violate the law, he had his day then. . ." Tr. 368 (another misstatement of the record).

These remarks, it is submitted, are governed by Harris v. United States, No. 21392 (Sept. 17, 1968), with sole difference that in this case the defendant was prejudiced.

Nor can the government claim that it was answering remarks of defense counsel. Not only would such an assertion be belied by the record, but the Fifth Circuit has given the answer to it:

> "We are not impressed with the argument that the conduct of the prosecutor was caused by the conduct of defense counsel. A prosecutor should be immune to improper tactics. If he feels that his opponent has overstepped, the remedy is an appeal to the trial court -- not in the adoption of unfair procedure." Dugan Drug Stores, Inc. v. United States, 326 F.2d 835, 837 (5th Cir. 1964).

VII. The Court Erred In Refusing To Instruct The Jury That The Defendant's Possession Or Nonpossession Of His Selective Service Certificate Was Irrelevant To Any Issue Properly In The Case.

On cross-examination of appellant, the prosecutor hammered on his intention to turn in his selective service certificates, and intimated in his questions that nonpossession of selective service certificates is a crime. Tr. 315A-18. In his summation, the prosecutor again took up this theme. Tr. 359. Defense counsel took strong exception to this tactic, for the question of possession of draft cards is an extremely technical one, and the raw assertion that nonpossession is some kind of offense has no place in questions and argument before a jury. See Dranitzke, Possession of Registration Certificates and Notices of Classification by Selective Service Registrants, 1 Sel. Serv. L. Rep. 4029 (1968). Particularly is this so when one reflects that the possession requirement has only recently been the subject of extensive judicial and scholarly discussion, which was not the case at the time of the acts in question.

While it might have been relevant to examine upon the defendant's intention to turn in his draft cards, the possible prejudice to the defense from this course would appear to outweigh the probative value of the evidence. See generally McCormick Evidence § 152, at 319-21 (1954). In any case, the trial court should have given the curative instruction asked by the defense, that the jury was not to consider the possession requirement as

having any relevance to the case. In the absence of such an instruction, the jury was left free to speculate that the defendant had merely come prepared to commit one crime and in fact had wound up committing another. If the prosecutor indeed wanted to make that point, the court, upon request, might have instructed the jury so that its deliberations on that score were based upon the law rather than upon guesswork. The government requested no such instruction, and hence there was no ground at all for the court to refuse the defense request that the possession issue be taken out of the case.

## VIII. The Court Applied An Erroneous Standard In Determining Whether To Disclose Portions Of The Presentence Report

F.R.Crim.P. 32(c)(2), as amended in 1966, provides:

> ". . . The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. . . ."

Under the authority of this provision, appellant's counsel called the trial judge prior to sentencing and requested disclosure of the presentence report. The trial court, through his secretary, told counsel that his practice was not to release presentence reports for counsel's examination. The telephoned request for the report was then repeated in open court and there

denied at the time of sentencing.[29]

First, appellant submits that amended Rule 32(c)(2) contemplates the exercise of discretion on an individual, case-by-case, basis, rather than a refusal of disclosure upon the basis of general policy considerations having no relationship to the case at issue. The court below not only expressly based its conclusions upon such general considerations, but did not give any reasons, peculiar to this case, for its refusal to disclose. The Advisory Committee which drafted the amended rules expressly stated (see 18 U.S.C.A. (1968 Supp.) following Rule 32) that amendment of the rule was designed to change the course of practice in federal courts:

> "It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences."

The exercise of discretion contemplated by the new rule will not take place unless there is a remand for resentcing in this case.

There is a second reason for disclosure in this case. The interest which the defendant harmed has, of late, been the subject of intense and acrimonious public debate. The mobilization of military power, and the broader issue of "national security are at once so recondite and so laden with emotion that disclosure of presentence reports should, in cases like this, ordinarily be

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[29] The transcript as reproduced by the court reporter does not include the proceedings at sentencing. If the court finds it necessary to the disposition of this appeal, the transcript should be typed up, appellant submits. However, since appellant's present counsel was present at sentencing, the government may well concede the facts as above stated.

made so that there is ample opportunity for the defendant to correct any misconceptions concerning his views which may have crept into the report and which may bear upon the sentence. Indeed, the danger that the presentence report, or materials summarized in it, may reflect the bias or prejudice of persons interviewed by the probation officer is greater in a case arising under the draft laws than in almost any other kind of case. This danger is implied recognized in a consistent course of federal decisions concerning disclosure of Department of Justice reports in conscientious objector cases under the pre-1967 provisions of law relating to processing conscientious objector claims.[30/] See United States v. Purvis, F.2d , 1 Sel. Serv. L. Rep.3228 (2d Cir. 1968). The same policy considerations underlie the growing significance of the adversary system's fundamental values in the fields of pretrial discovery and during the trial on the merits. See Dennis v. United States, 384 U.S. 855 (1966); United States v. Coplon, 185 F.2d 629, 638-39 (2d Cir. 1950).

Surely the trial court has "discretion," but it is to be exercised, appellant submits, not so as to call to mind Lord Chief Justice Holt's maxim, "Discretionary is but a softer word

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30/ The sentence given appellant was the only incarcerative sentence in a Selective Service case in this judicial district in calendar 1968, so far as counsel can determine. Only two other cases have come to counsel's attention, and in both probation was awarded. United States v. Margolies, 1 Sel. Serv. L. Rep. 3125 (D.D.C. 1968); United States v. Kennedy, 1 Sel. Serv. L. Rep. 3178 (D.D.C. 1968).

for arbitrary," but so as to reflect well upon the care and skill of federal district judges.

## CONCLUSION

For the foregoing reasons, appellant prays that the judgment of conviction be reversed, with directions to enter judgment of acquittal, grant a new trial, dismiss the indictment, or resentence the appellant, according to the grounds upon which the reversal is based.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 22,325

---

UNITED STATES OF AMERICA

v.

LOUIS E. LANDRY, Appellant

---

Appeal from the United States District Court

for the District of Columbia

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# PETITION FOR REHEARING

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IN THE

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No. 22,325

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UNITED STATES OF AMERICA

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Appeal from the United States District Court

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PETITION FOR REHEARING

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Appellant, by counsel, petitions under F. R. App. P. 40 for rehearing of the judgment entered in this action on February 6, 1970, and for entry of a judgment reversing his conviction.

## I. FACTS

The facts material to this appeal are set forth in the briefs filed by the appellant. On December 1, 1970, during oral argument, Point 2 in Appellant's Brief, concerning the motion to decertify this case from the ready calendar in the period immediately preceding the trial in June of 1968, was extensively discussed. The Court, by order of December 9, requested certain information from the government concerning the allegations of fact made in appellant's brief, and the government's policy respecting those accused of mutilating selective service certificates (50 U.S.C. App. § 462(b)).

On January 6, 1970, the government responded. It conceded the facts relied upon by appellant in his brief concerning the motion to decertify. However, the memorandum stated that "Insofar as the prosecutor informed the Court that if appellant voluntarily complied with the laws, the case might be dismissed, he was extending to appellant consideration far beyond the past and present general policy of the Department. . . ." The memorandum went on to state that the Department "would not oppose" a motion under F. R. Crim. P. 35 for reduction of sentence.

On February 6, this Court entered its judgment. On February 10, Kendall M. Barnes, Jr., an attorney for appellant,

called John A. Terry, counsel for appellee, to inquire about the government's position on reduction of sentence. Terry referred Barnes to the Department of Justice, and specifically to the attorney he said was in charge of the matter, Earl Silbert. Silbert was the attorney who made the motion to decertify, tried the case, and made the rebuttal summation referred to in Point 6 of Appellant's opening brief. Silbert stated that the memorandum of January 9 committed the Department only not to oppose a motion for reduction, and that he would remain silent with respect to such a motion, expressing no opinion to the district court either way on the matter.

Several additional facts should be brought to the Court's attention. First, the memorandum of January 9, does not report the entire transaction leading up to the motion to decertify. Prior to Mr. Silbert making the motion in 1968, defense counsel had several conversations with responsible officers of the Department of Justice, and was informed by Mr. Silbert that he had discussed the matter with these same people. The officers in question included Harold Shapiro, who as of 1968, had some responsibility in determining the government's position in cases of this kind. It should also be said that in selective service cases, as in many sorts of criminal cases, there are conflicting currents of policy at work in settlement conferences between lawyers.

The procedure which counsel can testify to, based upon his own experience and on conferences with defense attorneys, prosecutors and selective service system officials in a number of states, the District of Columbia and Puerto Rico is this: After an alleged violation of the selective service laws takes place, the case will be reviewed. Where the alleged violation is a failure to report for physical examination or induction, the local board will first review the selective service file and send it on to the State Director of Selective Service. The Selective Service System has a number of attorney-advisors throughout the country to examine these files before they are sent to the United States Attorney in whose jurisdiction the alleged offense was committed. In cases such as the present, not involving failure to report, the matter may be sent to the United States Attorney directly, and he may not even receive the selective service file of the registrant unless he requests it. Every United States Attorney with whom counsel has ever spoken has been willing to discuss a disposition of every selective service case in which counsel has ever been involved. This experience has been shared with other lawyers, who make the same report. Where the case involves a refusal to submit to induction as a means of testing the local board's refusal to grant a claimed classification or a local board procedural error, the United States Attorney reviews the file with the

registrant's claim in mind. If he declines prosecution, he will tell the local board why he has done so. The usual, though not invariable, result is that the local board will act as suggested by the United States Attorney.

In other cases, the United States Attorney negotiates as in the general run of criminal cases, and has the same option to decline prosecution. The Department's January 9 memorandum does not evince an intention of curtailing this discretion.

In short, in a system which relies upon the criminal process to the extent that Selective Service does, the prosecutor has a key policy-making role. This is particularly true since the decision in Gutknecht v. United States, Jan. 19, 1970, U.S.S.C., invalidating the delinquency regulations. Whether the Department admits it or not, his refusal to prosecute is a signal to the local board that it has no recourse against the registrant unless it complies with the United States Attorney's directions or suggestions, and it is not accurate to say that the Department does not have influence over the boards.

## II. ARGUMENT

The above summary of facts highlights the consideration that motivates this petition. There was at the argument much discussion of the government's position on dismissal of this

case, which may have obscured the significant issues presented in appellant's brief.

Counsel recalls that Judge Leventhal remarked, during argument, that the court does not sit to vindicate anyone's abstract notion of justice. The thrust of his remark was that if a result could obtain in this case which met the needs of all parties, such a result ought to be preferred.

Appellant stresses that the result in fact reached leaves him with a felony conviction (unless the court below should choose to proceed under the suspension of sentence provisions of the Youth Corrections Act, see United States v. Margolies, 1 SSLR 3125 (D.D.C. 1968). He is left with the opportunity to file a motion under Fed. R. Crim. P. 35, at the hearing of which (if there is a hearing) the same government lawyer who remained silent on the issue of sentence at the initial sentencing will again remain silent, this time in satisfaction of the promise made in the government's memorandum of January 9.

In the meantime, the court's decision, reported or not, is authority for several propositions of law which may work incalculable mischief in this jurisdiction. The trial court's definition of wilfulness was dangerously narrow, as attested by the cases cited in appellant's brief and the recent cases of Harris v. United States, 2 SSLR 3128 (9th Cir. 1969); Fisher v.

United States, 2 SSLR 3169 (4th Cir. 1969); and United States v. Krosky, 2 SSLR 3356 (6th Cir. 1969). The Court has approved "notice pleading" in cases of this kind, by upholding the indictment. It has left uncertain the question of prosecutorial discretion in terminating cases. It may have given an impetus to prosecutors in future cases to emulate government trial counsel's summation tactics.

Finally, the Court has impliedly approved conviction of appellant upon the basis of evidence which should not suffice to make a man a felon, particularly when one examines the evidence on intent.

In short, counsel submits that the consideration given the government's shifting position on the propriety of dismissing or otherwise terminating this prosecution may have obscured the other substantial issues at stake in this case. At bottom, this case asks the Court to consider the limits which must be placed upon the power of prosecutors and judges in the trial of conduct, allegedly unlawful, which takes place in the course of political expression. This was the theme of appellant's previous submissions, and the Court is respectfully asked to grant a rehearing. If necessary to permit full discussion, reargument or rebriefing upon any issue or issues might be ordered.

## CONCLUSION

For the foregoing reasons, and all the reasons set forth in the briefs and oral argument in this case, appellant respectfully prays that the judgment of this Court of February 6, 1970, be vacated, and that the conviction of appellant be reversed.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

The petition for rehearing is presented in good faith and not for purposes of delay.

Michael E. Tigar

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 22,325

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UNITED STATES OF AMERICA

v.

LOUIS E. LANDRY, Appellant

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CERTIFICATE OF SERVICE

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I hereby certify that a copy of the foregoing Petition for Rehearing was personally served, this 20th day of February, 1970, upon John A. Terry, Assistant United States Attorney, United States Courthouse, Washington, D. C.

Michael E. Tigar

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

---

No. 22325

---

LOUIS E. LANDRY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

# REPLY BRIEF FOR APPELLANT

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IN THE

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For the District of Columbia Circuit

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No. 22325

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LOUIS E. LANDRY, Appellant

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UNITED STATES OF AMERICA, Appellee

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

# REPLY BRIEF FOR APPELLANT

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## I. The Sufficiency of the Indictment

The government's response to appellant's brief virtually ignores the substantial questions of policy posed by the accusatory pleading in this case. Among these questions is that upon which a panel of this Court has recently spoken in Gaither v. United States, Nos. 21,780, 22,148 (Apr. 8, 1969). In Gaither, the Court reaffirmed the grand jury's role as the independent evaluator of the evidence against an accused, vested with discretion to return an indictment or not as it chooses.

Appellant has this day filed with the Court an excerpt from the grand jury minutes in this case indicating that at least one of the jurors had substantial reservations about the return of an indictment. Government counsel, rather than seriously considering and intelligently responding to these objections, rode roughshod over them. He did not invite the grand jury to consider whether the validity of the card's issuance was important to its deliberations. He did not invite the grand jury to consider the defendant's entire selective service file to determine if an indictment was warranted. Indeed, as indicated in appellant's opening brief, the selective service file was not even available to the grand jurors.

These facts can become relevant to the disposition of this appeal in two ways. If the court determines that the validity of the appellant's classification is an element of the offense of mutilation and destruction, then the indictment is invalid because the grand jurors heard no evidence on one element of the offense and, moreover, did not plead that element in the indictment.

Second, the vagueness of the indictment and the indications from the grand jury testimony that government counsel ran the grand jury to a plan of his conception rather than even

acknowledging its independence underscores an important point made in appellant's opening brief: Specificity of the indictment is a safeguard against prosecutors usurping the grand jurors' function of making decisions to prosecute.

Indeed, this Court is urged to consider whether the circumstances of this case would justify invocation of the rule in Gaither and dismissal or remand upon the basis of that decision.

III. Judicial Review of a Claimed Classification Defect

Government counsel cites a series of cases dealing with the right to "preinduction judicial review" of a claimed error in the classification or processing of a selective service registrant. These cases are discussed in Sel. Serv. L. Rep., Practice Manual ¶3530 (1969). They do not bear upon the point in issue here. Indeed, on page 17, the government appears to concede this point, as it urges the Court to apply to this case "the policy decision" inherent in the 1967 amendment to § 10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. § 450(b)(3). It does not, however, give any substantial reasons why this should be done.

The preinduction review cases, and the codification of their rule by the 1967 amendment of § 10(b)(3), are grounded

upon the judicial and legislative judgment that "litigious interruption" of conscription is to be tolerated only in carefully defined and limited circumstances. Here, on the other hand, the court is faced with a different question: If appellant is right that there was no basis in fact for his classification, and that a serious procedural error was committed in the course of his processing, then the cards in question served none of the purposes which the Supreme Court in O'Brien thought would justify imposition of criminal sanctions and a felony conviction upon one who destroyed or mutilated selective service certificates.

Under these circumstances, appellant would, if this conviction were affirmed, be punished for conduct which injures no valid governmental interest, but which has a conceded communicative function. Cf. Street v. New York, U.S. , 37 U.S.L.W. 4321 (1969). See also Pt. IV, supra.

## IV. The Definition of Mutilation

Running through the record of this case is the intention of the defendant and others to communicate their feelings about the Vietnam war and the draft on May 8, 1967. Elsewhere, appellant contends that the evidence showed that the specific act of tearing

was not "wilful," in the sense that term is used to define the offense, and that the district court improperly instructed the jury on this point. The government disputes this factual and legal contention, advancing the view that the defendant intended to mutilate his certificates.

If that is indeed the government's contention, and if this Court should agree, then the communicative character of the defendant's conduct could not be plainer, and we are brought to the constitutional issue which the government professes to be unable to see. The Supreme Court has held the card-destroying statute valid on its face, just as it held the "threat on the life of the President" statute valid on its face in Watts v. United States, U.S. , 37 U.S.L.W. 3397 (1969). But, also as in Watts, the facial validity of the statute does not justify a remorselessly literal reading of its terms. We are dealing here with behavior which seeks to communicate a political message, and a narrow construction of the statute is very much to be sought. Watts v. United States, supra. Yates v. United States, 354 U.S. 298 (1957); Schneider v. Smith, 390 U.S. 17 (1968). This is so even where the communicative behavior in question constitutes speech plus conduct, for regulation of speech must be by the narrowest available alternative means. Schneider v. Irvington, 308 U.S. 147 (1939). Cf. United States v. Robel, 389 U.S. 258 (1967).

Therefore, the government's assertion of the essential reasonableness of prohibiting mutilation of selective service certificates, page 19 of its brief, really misses the point. One might, for example, assume that a statute forbidding littering was constitutional, but it would still require to be narrowly read to ensure that leafleting (which consists of patrolling plus communicating) is not unduly hindered or hampered. Cf. Schneider v. Irvington, supra.

## V. Wilfulness

Government counsel's citation of the O'Brien case, at p. 20 of its brief, is most appropriate. The Court's opinion, particularly the part italicized by the government, correctly states the law -- the defendant must be shown to have "wilfully frustrated" a "governmental interest." It is for this Court to determine whether this language the more calls to mind the holdings in Spies and Screws, relied upon by appellant, or the "authorities" (none of them cited by the government) requiring only negligence as mens rea.

Respectfully submitted,

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